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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1238

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARINE DIVISION, ILA, AFL-CIO, and UNION DE TRABAJADORES DE MUELLES Y RAMAS ANEXAS, LOCAL 1740, ILA-AFL-CIO,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD

—and—

MARINE & MARKETING INTERNATIONAL CORPORATION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

International Organization of Masters, Mates and Pilots, International Marine Division, ILA, AFL-CIO, and Union De Trabajadores De Muelles Y Ramas Anexas, Local 1740, ILA-AFL-CIO, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on November 15, 1973 (*infra,* p. 1a).

OPINIONS BELOW

The opinion of the Court of Appeals, Judge David L. Bazelon dissenting, is reported at 486 F.2d 1271 (*infra*, pp. 3a-17a). The opinion of the National Labor Relations Board is reported at 197 NLRB No. 69 (*infra*, pp. 18a-42a).

JURISDICTION

The judgment of the Court of Appeals was entered on November 15, 1973 (*infra*, p. 1a). A petition for rehearing was denied on December 3, 1973 (*infra*, p. 2a). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

From the time that the ship was originally launched, throughout the nine years of its operation, its master and three mates had been members of and represented by MMP, a maritime union. After a change in the ship's operator, the new operator refused to employ the MMP master and mates, but instead hired a master and mates who were members of and represented by another maritime union, MEBA. The new operator shifted from MMP to MEBA officers, not because of any dissatisfaction with the performance of MMP officers, but because MEBA agreed with it to a financial arrangement which reduced the new operator's labor costs by about $100,000. The question presented is whether MMP, a union composed primarily of maritime supervisors but with a number of nonsupervisory employees among its members, is prohibited by section 8(b)(1)(B) of the National Labor Relations Act from peacefully picketing the ship for the purpose of persuading the new operator to restore the lost jobs

to the MMP officers, the picketing being unrelated in any way to the performance of any grievance adjustment functions by either MMP or MEBA officers.

STATUTE INVOLVED

Section 8(b)(1)(B) of the National Labor Relations Act (29 U.S.C. § 151) provides that "[i]t shall be an unfair labor practice for a labor organization . . . to restrain or coerce . . . an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances . . . ." Section 2(3) of the Act provides in part that the "term 'employee' shall include any employee, . . . but shall not include . . . any individual employed as a supervisor," and section 2(5) of the Act provides in part that the "term 'labor organization' means any organization . . . in which employees participate . . . ." Section 14(a) of the Act provides that: "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

STATEMENT

I. The Facts.

The M/V *Floridian*, a container type cargo vessel, is part of the American merchant marine (J.A. 14; 61, 3, 10). Owned by Containerships, Inc. (J.A. 14; 108-109), the vessel was until November 1970 operated for nine years by South Atlantic & Caribbean Line (SACAL) under lease from Containerships, car-

rying cargo between Miami, Florida, and San Juan, Puerto Rico (J.A. 14-15; 97). In November 1970 SACAL went bankrupt; the *Floridian* was decommissioned; and it was placed in dry dock at Norfolk, Virginia (J.A. 15; 58).

From the time it was originally launched, during the entire preceding nine-year period of its operation, the *Floridian's* crew was represented in collective bargaining by three separate labor organizations: the ship's master and three mates by petitioner International Organization of Masters, Mates and Pilots (MMP); the engineering officers by Marine Engineers Beneficial Association, District 2 (MEBA); and the unlicensed personnel by Seafarers International Union (SIU) (J.A. 14-15 and n. 2; 98, 111-112, 193).

Formed in March 1971, Marine & Marketing International Corporation (M&M) was organized to succeed SACAL as the operator of the *Floridian,* again plying the Miami-San Juan run (J.A. 13, 15; 57-58, 103, 107, 109). One Eduardo Garcia was M&M's actual head; he conceived its formation in late December 1970, determined its policy, and operated it (J.A. 15 and n. 3; 57, 103-104, 106-107).

Captain William Travers had been the *Floridian's* master before it was laid up (J.A. 17; 97). Having "had the highest reports about his professional ability and conduct" and having heard "everybody" speak "highly of him" (J.A. 97), Garcia met with Captain Travers in late February or early March 1971 (J.A. 97-98). They discussed the operation, capacity, schedule and condition of the *Floridian,* and at the conclusion of the conversation Garcia offered Captain Travers the command of the vessel (J.A. 98). Captain

Travers asked Garcia whether he was "going to operate the ship" with the MMP, and Garcia replied "No" (J.A. 99). By this time Garcia already "had ruled . . . out" MMP and instead "was contemplating" contracting with MEBA as the representative of the master and mates (J.A. 100, 107-108). Captain Travers declined joining the ship under the union aegis of MEBA, having had MMP membership for 18 years with but "two years to go on his pension" with MMP (J.A. 99). But for his lack of MEBA membership, Garcia would have been "[v]ery delighted" to have Captain Travers as master of the *Floridian* (J.A. 115).

Garcia contacted MEBA in March or April 1971 (J.A. 110). Agreement was reached on a manning scale more favorable to M&M than had prevailed when the *Floridian* had been operated by SACAL (J.A. 111). While retaining a master and three mates as before (J.A. 130), MEBA agreed to reduce the licensed engineers by one and SIU agreed to reduce the unlicensed seamen by three (J.A. 111-112, 102, *infra,* p. 4a). The reduction in crew size by four men resulted in a saving of $100,000 (J.A. 102, 212). According to M&M, MMP "has outpriced itself in the maritime market . . . . [Given] the prevailing MM&P wage structure and manning scales . . . [, its] contract, together with changes necessitated by that contract would have cost . . . [M&M] more than $100,000 additional labor costs . . ." (J.A. 211-212). Accordingly, although MEBA had formerly represented only the licensed engineers, on June 15, 1971 M&M entered into a three-year agreement with MEBA covering the master and mates as well as the licensed engineers (J.A. 15-16; 59, 89-90, 112, 142, 205-208). As before, the unlicensed personnel continued to be represented by SIU (J.A. 125; 133, 142, 216).

In late June 1971, subsequent to entry into the agreement with MEBA, Garcia hired Captain Donald Mappin as master of the *Floridian,* selecting him after a telephone interview only from among a number of candidates presented by MEBA (J.A. 16; 90, 94-95, 116, 133). Captain Mappin reported to the ship about July 10, 1971 while it was still in dry dock at Norfolk (J.A. 16; 94). He chose the chief mate, and the second and third mates were referred to the vessel by MEBA from its shipping list (J.A. 16; 138). Captain Mappin and the three mates are all MEBA members (J.A. 125). Under the MEBA agreement none but MEBA members can be selected as master or mates (J.A. 115-116).

From the inception of his plan to form M&M to take over the operation of the *Floridian,* Garcia knew that the ship had been formerly manned by masters and mates represented by MMP (J.A. 96, 98-100, 107-108, 109-110).

On July 13, 1971, an MMP representative boarded the *Floridian,* and asked Garcia "when he was going to order the officers for the vessel" (J.A. 16; 68). Garcia replied that he "had a captain already, that officers would shortly follow, and that . . . [he] was not ordering any other officers" (J.A. 16; 69). The MMP representative stated that the MMP "had been running that vessel since she was built and that they had very experienced members and . . . the best people in the trade" (J.A. 69); it "had been an . . . [MMP] ship and . . . he wanted . . . [MMP] people back in the deck department . . ." (J.A. 132). Garcia rejoined that he "already [had] a contract with another organization," to which the MMP representative responded that he was "making a big mistake" and

"some serious consequences" could ensue from his action (J.A. 16-17; 69, 132).

About ten days later the same MMP representative telephoned Garcia, again asking him when he "was . . . going to order the officers for the *Floridian*"; Garcia again demurred; but a meeting was arranged for Garcia to discuss the question with the president of the MMP (J.A. 17; 69). The two met in New York City that day or the next and discussed the master and mates to man the *Floridian* (J.A. 17; 70). The MMP president stated that " 'by tradition those jobs belong to us' "; that the "jobs aboard the vessel had always been supplied by his organization"; and that "he had excellent and experienced people to crew the vessel . . ." (J.A. 17; 70). Garcia replied that he "had a contract" with MEBA "and could not possibly change now . . ." (J.A. 17; 70). The MMP president warned Garcia "that they were going to stop the ship . . ." (J.A. 17; 71).

Manned by MEBA officers, the *Floridian* sailed from Norfolk and arrived at Miami at about 6:00 p.m. on July 30, 1971, to load its first cargo (J.A. 17; 71). As the ship docked, it was picketed by Captain William Travers, two of his mates, and a fourth officer; all were MMP members and Captain Travers and his two mates were the most recent officers aboard the *Floridian* when it had been operated by SACAL (J.A. 17; 72-73). The picket signs read "MV Floridian Unfair" to the named officer carrying the sign, further identifying him as a "Former" officer of the vessel and an MMP member (J.A. 17 and n. 7; 72-73, 190). The longshoremen observed the picket line (J.A. 17-18; 74, 77, 118-119). Within hours the Company obtained a state court temporary restraining order; the

picketing ceased; the ship was loaded; and it sailed the next day at 3:00 p.m. for San Juan, arriving there on August 3, 1971 (J.A. 18; 77, 119, 147).

After the *Floridian* docked at San Juan, the same four MMP officers who had picketed the vessel at Miami began to picket it at San Juan, two patrolling the ship where it was berthed at the pier within the terminal, and two patrolling at the gate of the terminal leading to the pier (J.A. 18; 77-78, 148-149, 154, 186-187). As a result of police intervention, all picketing was removed to the gate outside the terminal (J.A. 18; 149-151, 158, 185). The picket signs were essentially the same as those borne at Miami, except that the signs in English were supplemented by identical signs in Spanish, and except that wording was later added in English and Spanish stating that "There is no dispute with any other vessel" (J.A. 18, 19, n. 11; 78, 182-184). As an MMP representative explained, "We picketed the *Floridian* to get back the jobs that belong to the . . . [MMP] members, and that is our only reason" (J.A. 194). This representative informed Garcia during the San Juan picketing that "Basically, what we . . . [are] asking . . . [you] to do . . . [is] to replace the people that . . . [you] had displaced on the vessel—namely, the four officers—since they were . . . [MMP] members—restore them to their regular jobs" (J.A. 180). Garcia replied that "he could not . . . without permission from MEBA and the SIU in New York . . ." (J.A. 180). And so the *Floridian* was picketed by MMP because "they do not have our people on board and they will not have them on board" (J.A. 195).

The picketing continued for about six weeks (J.A. 19; 88). The longshoremen observed the picket line,

declining to unload the *Floridian,* but continuing to work other vessels berthed nearby (J.A. 19; 152-153, 155, 163-164). In mid-September 1971 a temporary restraining order was issued; the picketing ceased pursuant to that order; the longshoremen unloaded the *Floridian;* and the ship sailed from San Juan on September 17, 1971 (J.A. 19; 88, 120, 164-165).

The *Floridian's* master and mates "adjust grievances among crew members" (J.A. 20-21),[1] but this is "[a]n extremely insignificant part" of an officer's functions, both in time and importance (J.A. 197). As to Captain Travers, the *Floridian's* former master, no one had complained to Garcia about Captain Travers' performance in adjusting grievances (J.A. 113); on the contrary, Garcia would have been "[v]ery delighted" to have Captain Travers as master of the *Floridian* (*supra,* p. 5). In no conversation that Garcia had with any MMP representative did he ever discuss the grievance adjustment performance of either MMP or MEBA personnel (J.A. 115). No résumé of a master contains anything pertaining to grievance adjustment (J.A. 117-118). In selecting Captain Mappin as master of the *Floridian,* Garcia did not ask either Captain Mappin or his former employer as to his grievance adjustment performance (J.A. 118, 134). In general no inquiry is ever made of a master concerning his experience, ability or performance in grievance adjustment in considering whether to hire him (J.A. 172). To the knowledge of an informed mariner (J.A. 169-170), no master or mate has been discharged or

[1] The master does not—and necessarily the mates do not—participate in negotiating a collective bargaining agreement (J.A. 172, 192); "That is outside the province of the master" (J.A. 172).

reprimanded for any default in grievance settlement (J.A. 173, 189), and no statute or Coast Guard regulation "casts upon a captain the duty or responsibility for settlement of grievances" (J.A. 187, see also, J.A. 93). Finally, neither the MMP nor MEBA agreement covering deck officers mentions grievance adjustment in detailing the duties and responsibilities of the master and mates (J.A. 90-92, 205-208, 177-178, res. ex. 7, p. 5).

The MMP neither represents nor seeks to represent the licensed engineers or the unlicensed crew aboard the *Floridian*, confining itself strictly to its traditional AFL-CIO jurisdiction as the representative of masters, mates and pilots (J.A. 181).

II. The Decision of the National Labor Relations Board.

The Administrative Law Judge found that "[i]t is undisputed that from the outset Garcia decided to deal with MEBA with the intent of staffing the ship with officers who belonged to that labor organization, rather than to deal with MMP and hire MMP officers; it is further undisputed that this decision was motivated by Garcia's feeling that it would be economically more advantageous for the Company to deal with MEBA than with MMP" (J.A. 15-16, *infra*, p. 21a). He nevertheless concluded that, in resisting the displacement of the MMP officers by strangers to the vessel and in seeking to regain for them the positions they had formerly occupied on it, MMP violated section 8(b)(1)(B) of the National Labor Relations Act (J.A. 20-24, *infra*, pp. 25a-29a).

The Administrative Law Judge reached his conclusion by a swift syllogism. Section 8(b)(1)(B) of the Act makes it "an unfair labor practice for a labor

organization . . . to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances. . . ." MMP is a labor organization since its membership is not confined to supervisory personnel only (J.A. 14, *infra*, p. 20a);[2] the master and mates "adjust grievances among the crew members" (J.A. 20, *infra*, p. 26a); "picketing constitutes restraint and coercion . . ." (J.A. 21, *infra*, p. 27a); *ergo*, as "the object of the picketing was to require the Company to replace" MEBA officers with MMP officers, MMP violated section 8(b)(1)(B) because it exercised "coercion (picketing) to require the Company to change its selection of individuals whose duties include the adjustments of employee grievances" (J.A. 22, *infra*, p. 27a).

To the MMP's protest that this reading of section 8(b)(1)(B) is wholly alien to its purpose, the Administrative Law Judge responded that it suffices that MMP's conduct "is literally and directly encompassed within the language" of that section (J.A. 24, n. 16, *infra*, p. 29a, n. 16). To the MMP's complaint that its "objective to regain jobs that its members previ-

[2] The complaint alleged (J.A. 3), the answer did not deny (J.A. 10), and the Administrative Law Judge therefore found that MMP was a labor organization within the meaning of section 2(5) of the Act (J.A. 14 and n. 1, *infra*, p. 20a and n.1). Section 2(5) defines a labor organization as "any organization . . . in which *employees* participate. . . ." While section 2(3) of the Act excludes from the term "employee" "any individual employed as a supervisor," and while the MMP is primarily composed of maritime supervisors, it does include a number of statutory employees within its membership, and is therefore a labor organization within the meaning of the Act. *International Organization of Masters, Mates and Pilots of America* v. *N.L.R.B.*, 351 F.2d 771 (C.A. D.C., 1965).

ously held aboard the same vessel was a legitimate union goal," the Administrative Law Judge responded that "'a labor organization is clearly not free to utilize any means it chooses in order to achieve a desired result'", without any explanation as to his reasons for concluding that the statute faulted the means employed (J.A. 22-23, *infra*, p. 28a). To the MMP's objection that it could not have violated section 8(b)(1)(B) because its "conduct 'did not stem from any grievance adjusting activity on the part of the Floridian's officers'", the Administrative Law Judge responded that the "short answer to this is that the Board has considered and rejected a similar contention," citing two earlier companion decisions of the Board (J.A. 23, *infra*, pp. 28a-29a, and n. 15). As read by the Administrative Law Judge, these two decisions stand for the proposition that, so long as an individual is empowered to adjust grievances, it is irrelevant to the reach of section 8(b)(1)(B) that a union's objection to the employment of that individual is unrelated to his "collective-bargaining or grievance-adjustment functions" and has nothing to do with "the performance of statutorily protected functions" (J.A. 23, n. 15, *infra*, p. 29a, n. 15).

The two NLRB decisions upon which the Administrative Law Judge relied are *International Brotherhood of Electrical Workers, AFL-CIO, and Local 134 (Illinois Bell Telephone Co.)*, 192 NLRB 85 (1971), and *Local Union No. 2150, International Brotherhood of Electrical Workers, AFL-CIO (Wisconsin Electric Power Co.)*, 192 NLRB 77 (1971). The District of Columbia Circuit denied enforcement of the Board's order in the *Illinois Bell* case (*International Brotherhood of Electrical Workers, AFL-CIO and Local 134*

v. *N.L.R.B.*, 83 LRRM 2582 (C.A.D.C., 1973)), while the Seventh Circuit granted enforcement of the Board's order in the *Wisconsin Electric case* (*N.L.R.B.* v. *Local 1250, International Brotherhood of Electrical Workers, AFL-CIO*, 486 F.2d 602 (C.A. 7, 1973)). On January 21, 1974, this Court granted certiorari to review the judgment of the District of Columbia Circuit in *Illinois Bell. N.L.R.B.* v. *International Brotherhood of Electrical Workers, AFL-CIO*, October Term 1973, No. 73-795, 42 USLW 3416.

The Administrative Law Judge concluded that "the conduct of . . . MMP in picketing the vessel M/V 'Floridian' . . . restrained and coerced the Company in the selection of its representatives for the purpose of collective bargaining or the adjustment of grievances, and . . . MMP thereby violated Section 8(b)(1)(B) of the Act" (J.A. 23-24, *infra*, p. 29a). He *inter alia* ordered the MMP to cease "[p]icketing the vessel M/V 'Floridian' to procure the removal of . . . [M&M] of its representatives for the purpose of collective bargaining or the adjustment of grievances" (J.A. 29, *infra*, pp. 34a-35a). The Board adopted his decision and order without comment (J.A. 50-51, *infra*, pp. 41a-42a).[3]

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[3] The Administrative Law Judge also found, and the Board agreed, that petitioner Union De Trabajadores De Muelles Y Ramas Anexas, Local 1740, ILA-AFL-CIO, instructed the longshoremen to observe the picketing of the *Floridian* at San Juan, and thereby "acted in concert with . . . MMP . . . in violation of Section 8(b)(1)(B) of the Act" (J.A. 27, 50-51, *infra*, pp. 32a-33a, 41a-42a). The validity of the conclusion adverse to Local 1740 is dependent on the validity of the conclusion adverse to MMP, and the two therefore join in this petition to contest the interpretation of Section 8(b)(1)(B). However, the petition does not bring into issue the subsidiary conclusion that Local 1740 instructed the longshoremen to observe the San Juan picket line.

III. The Decision of the Court of Appeals.

A divided Court of Appeals, Judge David L. Bazelon dissenting, affirmed the decision of the Board.

The majority agreed that, in manning the *Floridian* with MEBA rather than MMP officers, the employer's reason for the change was "not any dissatisfaction with the performance of the former MM&P deck officers," but rested rather on the fact that the "new arrangement was financially beneficial to the company" in that "the shift to MEBA . . . evidently saved the company about $100,000 per year" (*infra*, p. 4a). It nevertheless concluded that MMP was barred from picketing to regain the lost jobs because its "actions come within the literal purview of the statutory language" (*infra*, p. 6a).

The majority acknowledged that "Congress intended to permit supervisors to resort to self-help" (*infra*, p. 6a), and that the legislative history of section 8(b)(1)(B) discloses "some evidence that Congress' primary concern was with situations falling" outside of the bounds of the instant activity (*infra*, p. 9a), but it was unpersuaded that it should go beyond "the statute's literal scope" (*infra*, p. 9a). It doubted that Congress "intended" a "*post hoc* inquiry into the employer's motives;" it refused to rest "the legality of MM&P's picketing on an open-ended inquiry into the company's 'real purpose' in choosing MEBA over MM&P;" its controlling concern was that the "company has an interest in being free from coercion in the selection of its grievance adjusters, no matter what its reasons for choosing one union over the other" (*infra*, pp. 9a-10a).

In the majority's view the solution available to MMP is to strip its membership of all statutory employees; it becomes by that action a simon-pure supervisory union outside the statutory scope of a labor organization to which the Act's prohibitions alone apply; and thereby it frees itself to "commit an unfair labor practice under any of the subsections of Section 8(b), including Section 8(b)(1)(B)" (*infra,* pp. 6a-7a). It granted that "this interpretation of the Act produces a rather arbitrary result, since the participation of 'employees' in MM&P has no real relevance to the present case" (*infra,* p. 7a), but it saw no feasible alternative to this construction (*infra,* p. 11a).

In dissent, Judge Bazelon protested that the majority's verbal logic "led into a *cul de sac*" by which the proper scope of section 8(b)(1)(B) is to be "deduced from the statutory language alone" *infra,* p. 13a). Thus, while the Act "left [supervisors] 'to seek redress in self-help' for their economic and organizational grievances," and did not limit the type of unions to which they might belong, the majority's interpretation curtails their resort to self-help by restricting them to action through simon-pure supervisory unions only (*infra,* pp. 14a-15a). Furthermore, while the maximum reach of section 8(b)(1)(B) extends no further than "employee union attempts, by discipline or otherwise, to force its supervisor members to perform collective bargaining or grievance adjustment functions in a manner favorable to the union" (*infra,* p. 15a), the majority's interpretation prohibits self-help in an area wholly outside the mischief at which the section is aimed. Additionally, while peaceful picketing enjoys special statutory and constitutional so-

licitude and is not to be barred absent the clearest showing that its interdiction is intended, the majority's interpretation nevertheless bans peaceful picketing even though the legislative history of section 8(b)(1)(B) "quite simply lacks any indication that it was intended to prohibit supervisors from peaceful picketing in protest of their employer's actions, at least when their protest does not even arguably favor the interests of their employer's rank-and-file employees" (*infra*, p. 16a). Accordingly, Judge Bazelon concluded, a balanced approach to the reach of section 8(b)(1)(B), meshing the entirety of the pertinent considerations, "favors a more narrowly drawn, more rational rule," one which does not trench on self-help to protect the employment interests of supervisors in circumstances devoid of incursion into the supervisor's performance of his grievance adjustment functions (*infra*, p. 17a).

REASONS FOR GRANTING THE WRIT

I

On January 21, 1974, this Court granted the Board's petition for a writ of certiorari in *National Labor Relations Board* v. *International Brotherhood of Electrical Workers, AFL-CIO*, October Term 1973, No. 73-795, 42 USLW 3416, to review the judgment of the Court of Appeals for the District of Columbia Circuit in two consolidated cases.[4] As in *Electrical Workers*, so here, at issue is the meaning of the section 8(b)(1)(B) of the National Labor Relations Act, and the rela-

[4] A companion petition of the charging party in one of the two cases was also granted on the same day. *Florida Power & Light Co.* v. *International Brotherhood of Electrical Workers, Local 641, et al.*, October Term 1973, No. 73-556. 42 USLW 3416.

tionship of the exclusion of supervisors from the protection of the Act in ascertaining that meaning. Indeed, one of the two cases embraced by the granted petition in *Electrical Workers* is the very case (issued simultaneously with a companion case) upon which the Board relied to furnish the premise for its decision here (*supra,* pp. 12-13).

In *Electrical Workers,* the Board in its petition stated that the question presented was "[w]hether a union violates Section 8(b)(1)(B) of the National Labor Relations Act by disciplining members who are supervisors for crossing a picket line and performing rank-and-file work during an economic strike against the employer" (p. 2). The essence of the Board's position is that the amenability of a member-supervisor to union discipline for performing rank-and-file work during a strike may have a general tendency to supinate the supervisor to the union's will in all matters and may therefore indirectly detract from his full effectiveness in representing his employer's interest in future grievance adjustment vis-a-vis his subordinate employees. As the Board sees it, adhesion to the union to promote strike solidarity supposedly undermines adhesion to the employer in grievance adjustment after industrial peace is restored. However farfetched it is, this speculation concerning the tractability with which the supervisor may be imbued—a view which reduces faith in a person's forthrightness and integrity in doing a job to the vanishing point—relates at least marginally to the protective function of section 8(b)(1)(B). For, even if tenuously, it looks to whether the union's conduct may impair the representation of the employer in grievance adjustment.

In the present case, however, the Board's interpretation of section 8(b)(1)(B) is not even arguably within the zone of that section's protective interest. The employer chose MEBA officers over MMP officers, not because of any concern over the grievance adjustment performance of either group, but solely to effectuate a saving in labor cost. MMP resisted the employer's choice and peacefully picketed to protest it, not for any reason which pertained to grievance adjustment by either the MMP or MEBA officers, but exclusively to recover the lost jobs for the MMP officers. Grievance adjustment was not a factor which entered into the employer's action or MMP's reaction. It was a neutral and indifferent element not relevant to the conduct of any. Indeed, since the MMP does not represent, and does not aspire to represent, any but the master and mates aboard the vessel (*supra*, p. 10), there is not even the link of union affiliation between officers and men which could conceivably adversely touch representation of the employer in grievance adjustment. Accordingly, although section 8(b)(1)(B) pivots on representation of the employer "for the purpose of collective bargaining or the adjustment of grievances," the Board finds a violation of that section in this case where that interest of the employer is not even tangentially implicated.

The Court should grant certiorari in this case and set it for argument in conjunction with the *Electrical Workers* case. The different perspective cast by the separate situations in each case throws a cross-light on section 8(b)(1)(B) which focuses the question of its meaning with maximum clarity and intensity. Joint consideration affords a superior opportunity for full exposure, enhanced insight, and informed delibera-

tion. The interpretation of section 8(b)(1)(B), novel in each case,[5] was first adopted by the Board almost a quarter of a century after its enactment, and is grave in its consequences to strike solidarity in *Electrical Workers* and to work preservation in this case. Joint consideration, illuminating section 8(b)(1)(B) in full dimension, should measurably assist in reaching a right reading of that section.

But should the exigencies of calendaring bar joint argument, comparison with *Electrical Workers* shows that the reading of section 8(b)(1)(B) adopted in this case has now carried the reach of that section beyond any reasonable interpretative stretch, and this case should therefore be heard regardless of the outcome in *Electrical Workers*.

II

The Court of Appeals holds that a union which has rank-and-file employees among its members cannot resort to self-help to protect the jobs of the supervisors it represents when grievance adjustment is one of the

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[5] The novelty in this case is emphasized by this Court's decision in *Hanna Mining Co.* v. *District 2, Marine Engineers Beneficial Assn.*, 382 U.S. 181 (1965). There, although the conduct alleged was economic pressure "to impose representation on unwilling supervisors" (*id.* at 193, n. 14), the Court held that peaceful picketing to achieve this end was neither arguably protected nor prohibited by the National Labor Relations Act. Yet, under the expansive view of section 8(b)(1)(B) adopted in this case, the picketing was surely arguably prohibited by that section because, if successful, it would tend to deprive the ship operator of the services of any officer who did not choose to stay with the ship in a union-represented position. But, given the correctly narrower concept of section 8(b)(1)(B) which prevailed until recently, it did not occur to anyone that section 8(b)(1)(B) could even be arguably implicated in *Hanna*.

functions that the supervisors perform. Since most supervisors do participate in grievance adjustment, the decision below vitally affects almost the entirety of supervisory labor relations. It imposes a choice between two equally unacceptable alternatives: either to create a simon-pure supervisory union or to have no means of self-defense to protect against employer action adverse to the supervisor-adjuster's economic interest in getting or keeping a job. Impalement on either horn of this dilemma presents questions of fundamental importance in the conduct of supervisory labor relations.

1. "Foreman membership in unions and the inclusion of foremen under agreements covering production workers are general in the printing and building trades, in the metal trades insofar as they operate on a craft basis, in many of the railroad trades, and to a greater or lesser extent, among the teamsters, longshoremen, and others."[6] Such membership of foremen in the same union as production workers "has been a longstanding practice."[7] MMP and MEBA are the two principal unions in the maritime industry representing supervisory personnel and in each rank-and-file employees comprise a substantial part of their membership.[8] And Congress was fully aware of the history of union representation of supervisors when it

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[6] Bur. Lab. Stat., Bulletin No. 745, Union Membership and Collective Bargaining by Foremen, 1 (1943).

[7] *Id.* at 2.

[8] *International Organization of Masters, Mates and Pilots of America* v. *N.L.R.B.*, 351 F.2d 771 (C.A.D.C., 1965); *National Marine Engineers Beneficial Association* v. *N.L.R.B.*, 274 F.2d 167 (C.A. 2, 1960).

enacted the 1947 amendments to the National Labor Relations Act (*infra*, pp. 35-36).

In these many and important industries, in which union membership in and representation of supervisors by mixed unions is traditional, it is now a practical impossibility to create simon-pure supervisory unions. Organizational, financial, beneficial and personal ties are too strong and imbedded to permit so radical a restructuring at so late a date. The alternative of creating simon-pure supervisory unions is therefore an unrealistic option.

2. Since the establishment of a simon-pure supervisory union is a Hobson's choice, the actual consequence of the decision below is to divest supervisor-adjusters and the unions which represent them of any means of self-defense to resist loss of jobs and job opportunities.

(a) This case exemplifies the foremost realistic risk. Jobs traditionally held aboard a vessel by one group of officers can be taken from them because it is cheaper to operate with another group of officers and the ousted group cannot even peacefully picket in an effort to recover their work. Given the existing unfortunate maritime union rivalry, and the natural desire of any ship operator to decrease his labor cost and increase his profit, shifts in officer complement to effectuate a cost saving can be expected upon the expiration of any existing agreement or where none exists.[9] The deterrent to that eventuality which until now has controlled its incidence is the availability of self-help to the ousted group. The decision below illegalizes recourse to self-

[9] *E.g.*, *MM&P* v. *American Oceanic Corp.*, 57 CCH Lab. Cas. ¶ 12,467 (D.C.S.D.N.Y., 1968).

help and therefore removes the deterrent. The entirely predictable outcome is to undermine job security as employers seek to effectuate a cost saving by shifts in crew complement. Since the decision below other ship operators have sought to emulate the employer's conduct in this case, and similar section 8(b)(1)(B) charges are pending before the Board. And this danger to job security exists not only in the maritime industry but in every other where the opportunity for such exploitation is realistically present.

(b) Except for the master and chief mate, the practice in the maritime industry in the hiring of officers is for the employer to secure his required complement by referral from the union with which he has contracted (see J.A. 138, 174-175). As stated in the standard MMP agreement (res. ex. 7, § 2(i), p. 8):

> Subject to the exceptions set forth in this Agreement with respect to Masters* and Chief Officers, the Employer agrees when filling a permanent or temporary vacancy, after giving effect to transfers or promotions from within the seniority list, that the employee shall be obtained through the offices of the Organization from off the Board from the Offshore Shipping List . . . .

As this Court has observed, "the hiring hall came into being 'to eliminate wasteful, time-consuming, and repetitive scouting for jobs by individual workmen and haphazard uneconomical searches by employers.' . . . [I]n fact it has served well both labor and management—particularly in the maritime field and the building and construction industry." *Local 357, Teamsters* v. *N.L.R.B.*, 365 U.S. 667, 672 (1961).

The hiring hall restricts the employer in his free choice of grievance adjusters because it does limit his

selection to the personnel referred by the union. Thus, under the mechanical view of section 8(b)(1)(B) adopted by the decision below, a union would be barred from resort to self-help to maintain the hiring hall should an employer oppose employment through it. Continuation of a rotational system of employment essential to an equitable distribution of employment opportunities would exist by employer sufferance alone. And illegalization of resort to self-help in order to protect a valuable hiring method would not be confined to the maritime industry but would extend to every other where union referral is the medium of employment.

(c) The standard MMP agreement provides in part that (res. ex. 7, § (e)(2), p. 7):

> Each Employer shall adhere to the policy of promotion or demotion from within the ranks of its Licensed Deck Officers (including Master*) and seniority shall prevail unless the necessary qualifications are unequal. Subject to the provisions of this Agreement, the Employer shall have the right to discharge employees for just cause.

Promotion from within, employment priority for the senior of equally qualified employees, and protection against discharge without just cause are common not only in the maritime industry but in every other industry where supervisors are union-represented. Each of these benefits restricts the employer in the free choice of his supervisor-adjusters. The mechanical interpretation of section 8(b)(1)(B) embraced by the decision below would therefore bar resort to self-help to protect these benefits from elimination by an employer insistent upon maintaining an utterly free hand.

The decision below thus seriously jeopardizes job security, pension stability,[10] equitable hiring procedures, and fair promotion and tenure practices in the maritime industry and in every other where union representation of supervisors prevails. It is therefore hard to overstate the importance of the question presented by the interpretation of section 8(b)(1)(B) adopted by the decision below in the conduct of supervisory labor relations.

III

The Board's interpretation of section 8(b)(1)(B) approved below rests on three fundamental errors: (1) it misconceives the function of section 8(b)(1)(B); (2) it overlooks that, while supervisors were in 1947 divested of statutory protection, they retained their right to self-protection by resort to self-help; and (3) it undercuts the explicit command of section 14(a) of the Act that "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization . . . ."

1. The dominating motif in the Board's interpretation of section 8(b)(1)(B) is that the MMP's picketing is within the literal ban of that section. But, without looking to other guides to interpretation, the words themselves do not bear the singular literal import at-

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[10] All maritime union pensions plans are industry-wide. Pension funding is based on industry-wide aggregate contributions, and pension eligibility is based on industry-wide employment. In recent years the industry has contracted for economic reasons. If, in addition, employers can break off collective bargaining relations at will, thus contracting further the pool of participating companies, then not only will the affected employees lose their pension eligibility, but the costs to the remaining employers will skyrocket. The industry can simply not afford this.

tributed to them. Section 8(b)(1)(B) bars a labor organization from restraining "an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances." These words are subject to three equally acceptable literal readings. They may mean, as the Boards says, that so long as "collective bargaining or the adjustment of grievances" are among the functions of an individual, then his selection by the employer must be free of union restraint even if the union's objection to him has nothing to do with his exercise of his responsibility for collective bargaining or grievance adjustment. Or, secondly, the words may mean that the employer is free of union restraint in selecting an individual to represent him when the union's objection to that individual pertains to his performance for his employer of the function of "collective bargaining or the adjustment of grievances." Or, thirdly, the words may mean that, so long as the dispute relates solely to the supervisors' own employment problems, section 8(b)(1)(B) has no application at all because "selection of representatives" appertains only to "collective bargaining or the adjustment of grievances" vis-a-vis statutory employees, a matter not involved in dealing with union-represented supervisors concerning their own economic problems. The words yield no plain meaning by which to choose among these rival interpretations.

2. But "[e]ven on the doubtful premise that the words" of section 8(b)(1)(B) have a plain meaning, "this does not end inquiry into Congress' purpose in enacting the section."[11] For a plain meaning and a

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[11] *National Woodwork Mfrs. Assn.* v. *N.L.R.B.*, 386 U.S. 612, 619 (1967).

perfect syllogism are often no more than "a bit of verbal logic from which the meaning of things has evaporated." [12] And so it is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers." [13] "That principle has particular application in the construction of labor legislation which is 'to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests.' " [14] "That is why all relevant aids are summoned to determine meaning." [15]

3. We therefore look to the reason underlying section 8(b)(1)(B). Described by Senator Taft as "not perhaps of tremendous importance," [16] the section has a very modest role which evoked no opposition.[17] Its design is to parallel the employees' freedom to choose their representatives without employer constraint with equivalent freedom of the employer to choose its repre-

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[12] *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 191 (1941).

[13] *Holy Trinity Church* v. *United States*, 143 U.S. 457, 459 (1892).

[14] *National Woodwork Mfrs. Assn.* v. *N.L.R.B.*, 386 U.S. 612, 619 (1967).

[15] *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 185 (1941).

[16] 93 Cong. Rec. 3837, in 1 Leg. Hist. 1012. "Leg. Hist." refers to the two-volume edition of the Legislative History of the Labor Management Relations Act, 1947 (U.S. Gov't. Print. Off., 1948).

[17] S. Rep. No. 105, 80th Cong., 1st Sess., 21; *id.*, Minority Views, 41; 93 Cong. Rec. 3837, 4143, 4904; respectively in 1 Leg. Hist. 427, 503; 2 Leg. Hist. 1012, 1077, 1454.

sentatives without union constraint. Specifically, an employer was not to be coerced in his decision to be represented or not represented by an employer association, his determination either way to be an unpressured choice to be made as he sees fit; similarly, an employer was not to be coerced in his selection of a foreman or other individual to adjust grievances for him, his determination of his representative for this purpose to be unpressured by a union's displeasure with or liking for a particular person's grievance handling. Thus, as the Senate Report stated (S. Rep. No. 105, 80th Cong., 1st Sess., 21, in 1 Leg. Hist. 427):

> . . . [A] union or its responsible agents could not, without violating the law, coerce an employer into joining or resigning from an employer association which negotiates labor contracts on behalf of its members; also, this subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling grievances.

Similarly, Senator Taft explained that (93 Cong. Rec. 3837, in 2 Leg. Hist. 1012):

> . . . [E]mployees cannot say to their employer, "We do not like Mr. X, we will not meet Mr. X. You have to send us Mr. Y." That has been done. It would prevent their saying to the employer, "You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you have to fire him, or we will not go to work." . . . Under this provision it would be impossible for a union to say to a company, "We will not bargain with you unless you appoint your national employers' association as your agent so that we can bargain nationally." Under the bill the employer has a

> right to say, "No, I will not join in national bargaining. Here is my representative, and this is the man you have to deal with."

Finally, Senator Ellender observed that (93 Cong. Rec. 4143, in 2 Leg. Hist. 1077):

> The bill prevents a union from dictating to an employer on the question of bargaining with union representatives through an employer association. The bill . . . makes it an unfair labor practice for a union to attempt to coerce an employer either in the selection of his bargaining representative or in the selection of a personnel director or foreman, or other supervisory official . . . . [Q]uite a few unions forced employers to change foremen. They have been taking it upon themselves to say that management should not appoint any representative who is too strict with the membership of the union. This amendment seeks to prescribe a remedy in order to prevent such interferences.

Thus, the mischief at which section 8(b)(1)(B) is aimed is foisting on an employer a representative he does not want but the union prefers, or forcing him to give up a representative he desires but who is objectionable to the union, when they face each other in collective bargaining or grievance adjustment. Protection of the employer's freedom to choose a representative focuses, as the section states, on "selection . . . for the purposes of collective bargaining or the adjustment of grievances." It is that function which is protected, and therefore the relevant inquiry when a union is charged with violating section 8(b)(1)(B) is whether it objects to the employer's choice because it dislikes the way in which he may represent the employer in collective bargaining or grievance adjustment.

But the Court of Appeals disdains this reading, deprecating a "*post hoc* inquiry into . . . motives", and scorning "resting . . . legality . . . on an open-ended inquiry into the 'real purpose' " of the actor (*infra*, pp. 9a-10a). Yet the entirety of the statute pitches the validity or invalidity of conduct on just such a search into the reasons for action. Thus, in determining whether an employer has breached his obligation to refrain from discriminating and a union its correlative obligation to refrain from causing him to discriminate (§§ 8(a)(3), 8(b)(2)), "[i]t is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test." *Local 357, Teamsters* v. *N.L.R.B.*, 365 U.S. 667, 675 (1961). Similarly, in determining whether an employer and a union have discharged their reciprocal duty to bargain with each other "in good faith" (§§ 8(a)(5), 8(b)(3), 8(d)), the inquiry goes to whether "the motive that actuated the conduct in question was in fact what the actor ascribes to it: *i.e.* that what he gives as his motive was in truth his motive." *N.L.R.B.* v. *James Thompson & Co., Inc.*, 208 F.2d 743, 745 (C.A. 2, 1953) (L. Hand, C.J.). Likewise, whether a union has engaged in a secondary boycott, a jurisdictional strike, or organizational or recognitional picketing prohibited by the Act depends on ascertaining whether "an object" of its activity is of the proscribed kind (§§ 8(b)(4), 8(b)(7)), a " 'difficult' " task in " 'drawing of lines more nice than obvious . . . .' " *National Woodwork Mfrs. Assn.* v. *N.L.R.B.*, 386 U.S. 612, 645 (1967).

An inquiry into motive which is central in the adjudication of other basic unfair labor practices does not suddenly become too onerous to make when an alleged violation of section 8(b)(1)(B) is at issue. As

the court below has itself observed, "Section 8(b)(1)(B) is, to a large degree, the correlative of the Section 7 guarantee to employees of the 'right to bargain collectively through representatives of their own choosing.'" *Meat Cutters Union Local 81* v. *N.L.R.B.*, 458 F.2d 794, 798, n. 10 (C.A.D.C., 1972). Were an employer to discharge an employee who was also a union representative, the decision as to the legality or illegality of that dismissal would have to rest on whether it was based on the employee's exercise of his representational functions or on activity outside the Act's protection. *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, 311 (1965). There is no slightest reason why the identical inquiry should not be required in the exactly parallel situation where it is a union which is said to have sought or caused the separation of an employer representative. As in the case of the employer, so in the equivalent case of the union, the necessary question is whether the protected exercise of representational authority was the reason actuating the union's objection to the employer's representative. If it was, section 8(b)(1)(B) has been violated; if it was not, section 8(b)(1)(B) is indifferent to it.

4. This interpretation of section 8(b)(1)(B) is essential in order to give rounded effect to the status that Congress gave supervisors in 1947. For, while Congress at that time divested supervisors of statutory protection, it preserved their common law right to self-protection by resort to self-help.

The beginning point is this Court's decision on March 10, 1947, in *Packard Motor Car Company* v. *N.L.R.B.*, 330 U.S. 485 (1947), interpreting the National Labor Relations Act prior to its 1947 amendment. By a 5-4 margin, this Court decided that su-

pervisors were employees within the meaning of the Act and therefore entitled to its protection. But while the division of the Court was sharp on this issue, the premise from which analysis began was uniform and unanimous. As expressed by Mr. Justice Jackson for the majority, "the company concedes that foremen have a right to organize. What it denies is that the statute compels it to recognize the union. In other words, it wants to be free to fight the foremen's union in the way that companies fought other unions before the Labor Act." *Id.* at 490. As Mr. Justice Douglas stated in dissent, "What I have said does not mean that foremen have no right to organize for collective bargaining. The general law recognizes their right to do so." *Id.* at 500. Accordingly, all granted the "altogether distinct . . . common-law right of workmen to combine . . . ."[18] What was at issue was whether that common law right had been accorded statutory protection. And the majority concluded that "there is nothing in the Act which indicates that Congress intended to deny its benefits to foremen as employees, if they choose to believe that their interests would be better served by organization than by individual competition." *Id.* at 490.

It was this interpretation of the Act that Congress reversed by its 1947 amendments. By providing that "the term 'employee' . . . shall not include . . . any individual employed as a supervisor" (§ 2(3)), Congress did deny statutory protection to supervisors, but by further providing that "[n]othing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organiza-

[18] *Fay* v. *Douds*, 172 F.2d 720, 724 (C.A.2, 1947) (L. Hand, C.J.).

tion" (§ 14(a)), Congress left untouched their common law right to combine.[19] The result, as all understood, was to remit the supervisor "to the alternative of economic self-help . . . ." [20] Accordingly, the "Taft-Hartley changes, while they do not outlaw foremen's unions, leave both foremen and employers to their economic weapons—the former to strikes and picketing to compel recognition, the latter to discriminatory discharges, espionage, and blacklists to combat efforts to organize." [21]

In this case, the peaceful picketing conducted by the MMP to recover for the MMP master and mates the jobs aboard the *Floridian* which they had traditionally held but which had been taken from them exactly

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[19] H. Rep. No. 245, 80th Cong., 1st Sess., 17; S. Rep. No. 105, 80th Cong., 1st Sess. 5, 19, 28; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 60; 93 Cong. Rec. 3423; respectively in 1 Leg. Hist. 308, 411, 425, 434, 564, 613; 93 Cong. Rec. 3836, 4136-37, respectively in 2 Leg. Hist. 1008-09, 1065.

[20] H. Min. Rep. No. 245, 80th Cong., 1st Sess., 72; S. Min. Rep., No. 105, 80th Cong., 1st Sess. 39, 40; 93 Cong. Rec. 3446, 7486; respectively in 1 Leg. Hist. 363, 501, 502, 652, 916.

[21] Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 1, 5 (1947). See also, Smith, *The Taft-Hartley Act and State Jurisdiction Over Labor Relations*, 46 Mich. L. Rev. 593, 600 (1948): "The result is that the collective bargaining position of such employees is to be determined by the parties themselves, not by law. This restores the situation to the status quo ante the original NLRA." And see, *District 2, MEBA v. New York Shipping Association*, 22 N.Y.2d 809, 812 (1968), cert. denied, 393 U.S. 960 (1968): "Section 14(subd.[a]) of the Labor Management Relations Act prevents supervisors' unions from claiming the benefit of statutes requiring employees to bargain collectively but does not limit their right to engage in otherwise lawful picketing (Bull S.S. Co. v. National Mar. Eng. B. Assn., 250 F.2d 332, 339; see Hanna Min. v. Marine Engrs., 382 U.S. 181, 189."

epitomizes the kind of dispute that Congress placed within the economic arena and left to arbitrament by self-help. It goes almost without saying that " 'practically always the crux of a labor dispute is who shall get the job, and what the terms shall be . . . .' " *United States* v. *Local 807, Teamsters,* 315 U.S. 521, 531 (1942). The matrix of the most fundamental of industrial conflicts is "competition for jobs . . . ." *United States* v. *Hutcheson,* 312 U.S. 219, 233 (1941). Work preservation is indeed at the core of statutorily-safeguarded activity when undertaken by employees within the Act's protection.[22] When Congress withdrew supervisors from the protective purview of the Act, it divested them of statutory safeguards in seeking to preserve their work, but it did not take from them their preexisting common law right to self-protection by resort to self-help to save their jobs.

To interpret section 8(b)(1)(B) to prohibit self-help by and for supervisors when work preservation is its aim is thus to break faith with the scheme that Congress fashioned in 1947 in treating with supervisors. Congress withdrew statutory protection from them; it did not divest them of self-protection. And this is especially evident when, as here, the means employed is peaceful picketing. "Throughout the history of federal regulation of labor relations, Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undersirable"; out-

[22] *National Woodwork Mfrs. Assn.* v. *N.L.R.B.*, 386 U.S. 612 (1967); *Houston Insulation Contractors Assn.* v. *N.L.R.B.*, 386 U.S. 664 (1967); *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203 (1964); *Local 24, Teamsters* v. *Oliver*, 358 U.S. 283 (1959).

lawry of peaceful picketing is eschewed absent " 'the clearest indication in the legislative history' . . . that Congress intended to do so as regards the particular ends of the picketing under review"; and this scrupulousness reflects "concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment." *N.L.R.B.* v. *Fruit & Vegetable Packers,* 377 U.S. 58, 62-63 (1964). That teaching is fully pertinent in the present case. Work preservation is no part of any evil at which Congress has aimed. It has nothing to do with union constraint to require an employer to choose one rather than another individual to represent him in collective bargaining or grievance adjustment based on displacing the employer's choice with the union's preference, which is the province of section 8(b)(1)(B). It has nothing to do with the power given the employer free of statutory governance "to discharge foremen as a means of ensuring their undivided loyalty, in spite of any union obligations",[23] which is the basis for denying statutory protection to supervisors (*supra,* p. 32, n. 19). As here, when peaceful picketing is so clearly outside any mischief that Congress has concretely identified, and when recourse to it is so clearly within the area of self-protection that Congress preserved for the supervisor, there is no room for an interpretation which bans it.

5. According to the Court of Appeals, the only way by which MMP can resort to self-help to defend the supervisor-adjusters it represents against inroads on their work is to become a simon-pure supervisory union. "Such a union . . . cannot commit an unfair

[23] *Carpenters District Council of Milwaukee County* v. *N.L.R.B.,* 274 F.2d 564, 566 (C.A.D.C., 1957).

labor practice under any of the subsections of Section 8(b), including Section 8(b)(1)(B)" (*infra*, p. 7a). We have already shown that conversion into a simon-pure supervisory union is a practical impossibility (*supra*, pp. 20-21). We now show that imposition of that illusory option is indefensible as a matter of law.

Confinement of membership to a simon-pure supervisory union as the price of self-defense affronts the express stricture of section 14(a) that "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization . . . ." By statutory definition the "term 'labor organization' means" one "in which employees participate" (§ 2(5)), so that section 14(a) expressly preserves supervisory membership in unions which also include rank-and-file employees. And in this instance Congress intended the plain meaning that its words denote. It knew of the "long history of successful union activities on the part of supervisors in the building industry, the maritime industry, the printing industry, and the railroad industry . . . ."[24] This history included membership of supervisors in the same union with rank-and-file employees (*supra*, p. 20). What Congress preserved, therefore, was supervisory membership in mixed as well as simon-pure unions.

Indeed, in insisting upon simon-pure supervisory unions as the price of self-protection, the Court of Appeals imposes a compromise that Congress rejected, and unwittingly puts the supervisor in more straitened

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[24] S. Min. Rep. No. 105, 80th Cong., 1st Sess., 40; H.Min. Rep. No. 245, 80th Cong., 1st Sess., 72; 93 Cong. Rec. 3418, 3446; respectively in 1 Leg. Hist. 502, 363, 604, 652; 93 Cong. Rec. 4350, in 2 Leg. Hist. 1162.

circumstances than Congress contemplated. To meet the argument against dividing the supervisor's loyalty in serving his employer, but to preserve a measure of statutory protection for the supervisor in seeking collective bargaining to further his self-interest as an employee, the proponents of statutory protection proposed that the supervisors limit their organization to simon-pure supervisory unions and that they be statutorily safeguarded when they confine their concerted activity to unions restricted to themselves.[25] Accordingly, to accomplish this end, only simon-pure supervisory unions would be eligible for certification as a bargaining representative of supervisors, except in those situations where representation by a mixed union was the "prevailing custom prior to July 1, 1935 . . . ."[26] But this compromise was voted down.[27] Instead, the view which prevailed was that *"Congress must exclude foremen from the operation of the Labor Act, not only when they organize into unions of the rank and file and into unions affiliated with those of the rank and file, but also when they organize into unions that claim to be independent of the rank and file."*[28]

Accordingly, what Congress did was to deny statutory protection to supervisors whether they organized into simon-pure supervisory unions or into mixed unions. What it did *not* do was to make their right

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[25] S. Min. Rep. No. 105, 80th Cong., 1st Sess., 40, in 1 Leg. Hist. 502; 93 Cong. Rec. 4350, 4440, 4904, 4985, 5005, 6501, 6527, in 2 Leg. Hist. 1162, 1214, 1452, 1460, 1480, 1576, 1606.

[26] 93 Cong. Rec. 5117, in 2 Leg. Hist. 1521.

[27] *Ibid.*

[28] H. Rep. No. 245, 80th Cong., 1st Sess., 15 (emphasis in original), in 1 Leg. Hist. 306; 93 Cong. Rec. 3836, 5116, in 2 Leg. Hist. 1008-09, 1519.

to self-help dependent upon whether they organized into simon-pure or mixed unions. Yet the decision below does just that. For it distinguishes between simon-pure and mixed unions and allows recourse to self-help only when the supervisor undertakes it through a simon-pure union. This is destructive of Congress' plan.

The preoccupation by the court below with the mixed or simon-pure character of the union to which the supervisor belongs has been justly criticized by the Ninth Circuit as a "rather mechanical approach to . . . statutory interpretation . . . ." *Dente* v. *International Organization of Masters, Mates, and Pilots, Local 90,* 84 LRRM 2982, 2983 (C.A. 9, 1973). Thus, in considering the status of a simon-pure supervisory union and its right to sue for breach of contract pursuant to section 301 of the Labor Management Relations Act, 1947, the Ninth Circuit concluded that Congress "did not intend to deprive members of 'supervisory unions' of the rights secured by section 301," rejecting the argument that the union was not a statutory "labor organization" and relying instead on the view that the right to bring an LMRA § 301 action was wholly outside the mischief at which Congress aimed in denying supervisors bargaining and organizational protection. *Ibid.* Similarly, in dealing with the claim that a simon-pure supervisory union was not subject to the "national emergency" strike provisions of section 208 of the Labor Management Relations Act, 1947, because it did not represent statutory "employees," the Second Circuit held that the emergency procedure does apply because freedom from this requirement was no part of the purpose of Congress in denying statutory protection to supervisors. *United States* v. *National Marine Engineers' Beneficial Assn.,* 294 F.2d 385,

390-393 (C.A. 2, 1961). So here, the legality of the activity turns, not upon the irrelevancy of the simon-pure or mixed membership of the union to which the supervisor-adjusters belong, but upon the fact that the right to peacefully picket to recover their lost jobs is no part of the evil that Congress perceived in denying them statutory protection but in preserving their right to self-protection.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted, and the case should preferably be set down for argument together with *National Labor Relations Board* v. *International Brotherhood of Electrical Workers,* AFL-CIO, October Term, 1973, No. 73-795.

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